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IN THE

Supreme Court of the United States

October Term, 1943.

No. 362.

AUGUSTUS P. NORTON, Deputy Commissioner for the Third Compensation District,

Petitioner,

v.

WARNER COMPANY.

Answer to Petition for Writ of Certiorari.

EVERETT H. BROWN, JR.,
S. B. FORTENBAUGH, JR.,
SHIELD, CLARK, BROWN & MCCOWN,
Counsel for Respondent.

International, 236 Chestnut St., Philadelphia

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IN THE

Supreme Court of the United States

No. 362. October Term, 1943.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT,

Petitioner,

v.

WARNER COMPANY.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED.

Whether the finding of the Deputy Commissioner that a bargeman is not "a master or member of a crew" within the exclusionary provisions of Section 3 (a)-(1) of the Longshoremen's & Harborworkers' Compensation Act (c. 509, 44 Stat. 1424, 33 U. S. C. sec. 903 (a) (1)) is conclusive where the basic facts competently found by the Commissioner rightly call for a different conclusion.

STATEMENT OF THE FACTS.

The Respondent, Warner Company, agrees with the statement of the Petitioner. It is desired only to point out that the claimant bargeman, Rusin, did not load or unload or handle or supervise in any manner or at any time any cargo aboard his barge and had no duties in connection therewith except those of any master responsible for the

safeguarding of his vessel in navigation. At the time of the accident occasioned by the slipping of the capstan bar, there was no cargo aboard the Barge No. 59. It should be further pointed out that the Barge No. 59 and Rusin were not engaged solely in transportation within Philadelphia harbor and vicinity, but serviced rivers and tributaries within the states of Pennsylvania, New Jersey and Delaware throughout the thirty mile radius in all directions from Philadelphia as noted by the Commissioner.

ARGUMENT.

Counsel for the Respondent, Warner Company, find themselves herein in the position of making an argument exactly contrary to that unsuccessfully urged by them as Petitioners in *Loverich v. Warner Company*, 118 F. 2d 690 (CCA 3rd, March 17, 1941,) certiorari denied 313 U. S. 577, "whose facts as to the employee's duties and services aboard the barge are indistinguishable from the facts of the instant case". *Warner Company v. Norton and Rusin*, 137 F. 2d 57, 59 (CCA 3d, June 17, 1943). The *Loverich* case is not only "on all fours" with the within *Rusin* case, but concerns the same employer, the same employment, the same locale, the same working conditions and the same liabilities.

The argument of the Warner Company that *Loverich* was a harborworker under the jurisdiction of the Longshoremen's Act was rejected two years ago by the Third Circuit Court of Appeals and your Honorable Court thereafter denied its petition for certiorari. The within Petitioner in the *Rusin* case can only be classified and treated likewise; there has been no change in the law or the decisions in the interval.

Petitioner urges as the primary reason for granting its prayer for writ of certiorari that "the lower court failed to give proper effect to the decision of the court in *South Chicago Coal & Dock Company v. Bassett*, 309 U. S. 251". (Petition Page 7.) It certainly cannot be urged that the *South Chicago* decision was not examined in detail since it was expressly distinguished in the *Loverich* case and was cited five times in the *Rusin* case and three times by the same lower court in a companion decision handed down on

the same day, June 17, 1943, *Berwind-White Coal Mining Company v. Rothensies*, 137 F. 2d 60.

It is not challenged by the Petitioner that the decisions in *Lovérich v. Warner* and *Rusin v. Warner* are entirely consistent with each other. It is respectfully submitted by the Respondent that both these Warner Company cases are also consistent with the *South Chicago* case and that, moreover, there is no federal question of any substance here involved.

Petitioner now argues that the findings of the Longshoremen's Commissioner claiming jurisdiction are findings of fact and as such not subject to review, that if they are findings of law they are not consistent with the decided cases other than *Loverich*, and finally that administrative expedition requires upholding the Commissioner's judgment, even if it results in a "shadowy area". The Third Circuit Court of Appeals anticipated and answered all these attempts of the Petitioner, which will be considered in the same order.

1. There was no conflicting testimony before the Longshoremen's Commissioner as to the character of the duties of Rusin. The Commissioner simply adopted the undisputed facts in the case and then jumped to the conclusion that Rusin was a harborworker. There has not been any argument as to the basic facts or as to any implications of fact to be drawn from the testimony. The sole question has been as to the conclusion.

Frequently in other cases there have been questions of fact which had to be determined before the presentation of the legal issue of jurisdiction, and in the determination of such facts, the issue of jurisdiction has become

entirely clear. It is not disputed that the Commissioner alone should resolve finally the contradictions of testimony and that such findings of fact should be the basis for findings of law. The cases cited by the Petitioner all stand for this primary principle, but must all be examined on their own peculiar facts.

In the *South Chicago* case, supra, it was found as a fact that the claimant was a mere watcher of a coal chute who slept on deck while the vessel was underway and who had no duties in connection with the two to three hour trips which were entirely for the fueling of harbor craft. In *Nogueira v. New York, New Haven & Hartford Railroad Company*, 281 U. S. 128 (1930), he was a stevedore. In *Seneca Washed Gravel Corp. v. McManigal*, 65 F. 2d 779 (CCA 2d 1933), he was a night watchman. In *DeWald v. B. & O. Railroad Company*, 71 F. 2d 810 (1934), certiorari denied 293 U. S. 581, he was a cargo watcher and freight handler. In *Diomede v. Lowe*, 14 F. Supp. 380, 87 F. 2d 296, certiorari denied 301 U. S. 682 (1937), he was again primarily concerned with the loading and discharging of the cargo of a dump scow. In *Parker v. Motor Sales*, 314 U. S. 244 (1941), the claimant was an outboard motor salesman and the only question was whether the accident happened in the course of employment. In *Davis v. Department of Labor and Industry*, 317 U. S. 249 (December 14, 1942), the claimant was cutting steel into lengths and there was no evidence of any barge operational duties.

The only identical twins in the jurisdictional decisions are the cases of *Loverich v. Warner* and *Rusin v. Warner*. There is however a consistent thread running through all the cases construing this exemptive clause of the Longshoremen's Act, which principle was well set forth by your

Honorable Court in the *South Chicago* case as follows (Pp. 257, 260):

> "The question is whether the decedent in this instance fell within that class . . . of longshoremen and harborworkers who were performing labor on a vessel. . . . The question concerns his actual duties. . . . these duties did not pertain to navigation".

While your Honorable Court found in the *South Chicago* case that the claimant was not a "master or member of the crew" because his duties were those of a laborer rather than a seaman, and that the Commissioner's finding must be sustained, it was noted that this would be so only "if there was evidence to support it". (Page 258.)

2. The Lower Court herein (page 58) repeated and applied the principle that "we necessarily take as conclusive the facts as found by the Commissioner". The Lower Court denied only that it need accept the "Commissioner's conclusion . . . if the basic facts competently found by the Commissioner rightly call for a different conclusion". The position of the Lower Court is clear that where the basic facts competently found demand another conclusion, the question is one of law for appellate correction.

The fact findings of the Commissioner herein have never been disputed and it is not bandying words to insist that the whole course of this litigation has been concerned with the legal issue of sufficiency of evidence. Certainly appellate courts are not deprived of the right to review where there is no evidence of the conclusion of jurisdiction, or, conversely, the evidence only permits of another conclusion.

Petitioner would not presumably follow his argument to the logical reduction that there should be no appeal from

a Commissioner's conclusion that the sum was five if the parts were two and two.

It has never been claimed herein that Rusin was a freight handler or a cargo watcher. It is apparently nevertheless argued that his legal status was not that of one engaged in vessel operations because his type of vessel allegedly needs no operator whatsoever. Attempt is made to classify him as something less than a master or member of the crew because he did not control the course of his vessel.

It is respectfully submitted that these attempts to determine jurisdiction on mathematical, geographical or horsepower basis must fail when construing an Act of Congress as clear as this one. Are we to separate the beneficiaries of the Longshoremen's Act from the wards of admiralty on the one hand and the recipients of state compensation on the other hand because sometimes there are two men rather than one man aboard; because sometimes the vessel goes ten miles at sea and sometimes goes sixty miles on the Delaware River; because sometimes the vessel has an outboard motor instead of an attending tug?

The question herein is one of law. There was no evidence—let alone a sufficiency—to deprive the claimant of the status of a master or member of the crew. He functioned as a seaman and would not have been more of a seaman if he had a companion, or if he had gone a few miles further.

In *Davis v. Department of Labor and Industry*, supra, your Honorable Court did not hesitate to disregard the findings of four lower tribunals when a different legal conclusion as to jurisdiction was indicated.

3. Finally the Petitioner has resorted to one of those public policy arguments, which are themselves in the shadowy area which Petitioner apparently thinks would be an inevitable result of the expeditious administration of the Longshoremen's Act. It is urged that there must be no appeal, whether the question be of fact or of law, so that there may be quick payment to beneficiaries.

The only purported authority for such economic argument is the recent case of *Davis v. Department of Labor and Industry*, supra. The end-result of that decision, of course, is directly contrary to the prayer of the Petitioner herein since there the decisions of all four lower tribunals are reversed. More important even, the *Davis* case is concerned with the twilight zone between Federal and State jurisdiction. There is no attempt therein to argue or decide that the claimant, measuring steel in dismantling a bridge, was a master or member of the crew. The exemptive clause was not in question.

When the Petitioner extends the argument by stating that the within decision as it now stands would deprive the bargeman of his last resort, there is complete misunderstanding. The bargeman who is a master or member of the crew has resort to admiralty jurisdiction and is generally entitled to maintenance and cure, and the best example thereof is *Loverich v. Warner*, supra. Because there are cases where there may be no recovery in admiralty because the facts do not contain a cause of action, does not justify the untrue statement that there is no alternative right or remedy for this exemptive class. These bargemen have the same maritime benefits, public health service, wage protection, etc. as any other seamen.

No one word is going to resolve all the difficulties of demarking this exemption, but it is respectfully submitted that all the decisions of your Honorable Court and the various Circuits have turned and properly should turn on the question of whether the claimant was engaged in helping in the operation of the boat. (We use "operation" instead of "navigation" for fear of continuing the technical fallacy of the Petitioner in arguing that "navigation" means controlling the course of the vessel.) It is respectfully submitted that this general formula set up by the courts is an eminently practical guide for administration by Longshoremen's Commissioner. To be sure it will not eliminate all litigation, but, more important, it will not make the Commissioners' decisions the arbitrary absolute they might otherwise become.

WHEREFORE it is respectfully submitted that there is no conflict between the within decision of the Third Circuit Court of Appeals and the decision of other Circuits, and there is no conflict with any of the applicable decisions of your Honorable Court, and that the within petition should be denied.

EVERETT H. BROWN, JR.,
S. B. FORTENBAUGH, JR.,
SHIELDS, CLARK, BROWN & MCCOWN,
Counsel for Respondent.